NGUI YU THAU

v.

WONG MU KHYUN & ORS (NO 2)

HIGH COURT SABAH AND SARAWAK, SANDAKAN
RICHARD MALANJUM J
[SUIT NO: S22-35-1997]
12 MARCH 2003

LAND LAW: *Transfer - Forged transfer - Purported transfer of title deeds by forged signatures - Whether void - Proof of forgery - Whether on balance of probabilities - Whether one derives good title, right or interest of land through forged instrument - Limitation - When time should begin to run - Whether from time when alleged forgeries became apparent to plaintiff - Whether plaintiff's claim time-barred*

LAND LAW: *Transfer - Transfer of title deeds of land - Validity of - Whether transfer obtained by fraud or dishonesty - Whether third defendant a bona fide purchaser for value without notice - Power of attorney - Whether valid, effective and enforceable - Whether transfer of said lands to be declared null and void*

The plaintiff as administrator of the estate of one Ngui Tet Loi ('the deceased') commenced this action regarding four pieces of land situated at Lahad Datu ('the said lands'). The facts were that the plaintiff had given the title deeds of the said lands to the first defendant in January 1995 so that she could use them to raise money for her medical expenses. The first defendant had borrowed money from the second defendant and subsequently when the first defendant could not pay back the loan, the title deeds of the said lands were hence passed to the second defendant, except for one piece of land which was CL115325758. The rest of the said lands ('the acquired lands') were then registered in the name of the third defendant since 17 October 1995 and the title deeds were in its possession. The first defendant had since passed away.

The plaintiff's case was that the alleged signatures of the deceased as the transferor on the memoranda of transfer purporting to transfer the said lands to the first defendant were forgeries. The plaintiff further contended that the first defendant had no power to give any power of attorney to the second defendant. Hence, all transactions in respect of the said lands divesting the deceased of the ownership of the same were void *ab initio*. The plaintiff prayed for a declaration that the transfer of the said lands to the first defendant and

all subsequent dealings, transfer including registration to the second and third defendants be declared null and void. The second defendant claimed that the first defendant owed her money and since the first defendant could not repay the loan, the second defendant was therefore given the title deeds of the said land with instruction to sell them and the proceeds to pay for the loan. Furthermore, the second and third defendant argued that the period of limitation should begin to run from the time the plaintiff was appointed as administrator of the estate of the deceased which was on 7 September 1987. Therefore the plaintiff was time barred. As for the the third defendant who at the material time was developing a golf course, its director (DW2) contended that he had taken the proper steps before concluding the deal with the second defendant and had possessed no knowledge of any adverse claim on the said land or defects in the ownership. Thus the third defendant relied on the defense of *bona fide* purchaser for value and without notice.

The issues to be tried were: (1) when the period of limitation should begin to run; (2) whether forgery was involved in respect of the signatures of the deceased transferor and the attestor in the memoranda of transfer; (3) whether the transfer of the said lands to the first defendant and all subsequent transfers were null and void; (4) whether the third defendant was a *bona fide* purchaser; and (5) whether the execution of the power of attorney in favour of the second defendant by the first defendant was valid, effective and enforceable.

Held:

[1] This action was commenced in 1997 and hence at most it would only be less than three years from the time the title deeds were first given away in 1995. That of course would be taking the time of parting with the title deeds as the starting point. However, in this case, time should begin to run from the date when the alleged forgeries first became apparent to the plaintiff. Accordingly, the issue of limitation was without any merit. (p 281 b, d)

[2] The expert witness (PW1's) expertise in handwriting was not doubted and there was no reason not to accept his evidence pertaining to the authenticity of the disputed signatures. PW1 gave his reasons for coming to his conclusion and the final report that he prepared was duly admitted in evidence. Meanwhile the defendants failed to discredit those reasons or the method adopted in coming to his conclusion. The defendants also deemed it unnecessary to call their own expert witness to counter PW1's evidence. On a balance of probabilities the plaintiff had proved the

disputed signatures to be the product of forgery and that the attesting signatures to the disputed signatures were also forged. (pp 284 d-e & 285 d)

[3] Under the Sabah Land Ordinance ('the Ordinance') there is no provision for indefeasibility of title on registration, similar to that found in the National Land Code. However, in Sabah, with specific reference to land, the principle as enunciated by the Federal Court in *Adorna Properties Sdn Bhd* applies, notwithstanding the *lacuna* in the Ordinance. No one derives good title, right or interest from or through a forged instrument unless he satisfies the doctrine of *bona fide* purchaser for value and without notice. (p 289 c)

[4] There was no evidence to indicate that DW2 was instrumental in getting the agreement of the first or second defendant to sell the acquired lands. In fact it was in evidence that DW2 used the services of a legal firm to handle the transaction. And although it was not in dispute that DW2 was then actively developing a golf course, that would not be sufficient to show that he behaved dishonestly. The third defendant had proved on the balance of probabilities that in purchasing the acquired lands it was a *bona fide* purchaser for value without notice. (p 291 f, h-i)

[5] The validity of the power of attorney was a non-issue. The transfer from the plaintiff to the first defendant was on the basis of the memoranda of transfer. Also the transaction between the first defendant and the third defendant only took place on 17 October 1995 which was well after the registration of the first defendant as the registered owner of the lands. (p 292 g-h)

[5a] As for the time in the creation of the power of attorney, it was not in dispute that in January 1995 the title deeds were given to the 1st defendant by the plaintiff who knew that it could be used as security for loan that might be taken by the 1st defendant to pay for her medical expenses. As the beneficial owner, it should entitle the 1st defendant to act on the title deeds including the creation of the power of attorney. In view of the finding on the status of the 3rd defendant as a *bona fide* purchaser for value and without notice, this issue on the power of attorney was of no legal significance. (p 293 a-c)

[6] In respect of the signatures on those memoranda of transfer added by the fact that the representatives of first defendant did not appear to defend the claim in this trial, the court ordered the reversion of the ownership of CL115325758 to the estate of the deceased with the plaintiff as the administrator. The claim of the plaintiff against the first defendant was allowed to the extent of the order. In respect of the plaintiff's claim against the other defendants for the acquired lands, the court dismissed it for the reasons given above. In so far as the second defendant was concerned, there was no transfer of ownership of any of the said lands to her. She was only the donee under the power of attorney granted by the first defendant. (pp 293 f-h & 294 a-b)

[Ordered accordingly.]

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Borneo Housing Mortgage Finance Bhd v. Times Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***
Chu Choon Moi v. Ngan Siew Tin [1986] 1 MLJ 34 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Pekan Nenas v. Chang Chin Chuen [1998] 1 CLJ 793 FC ***(refd)***
Pilcher v. Rawlins [1871-72] 7 LR Ch Appellant 259 ***(refd)***
Wilkes v. Spooner [1911] 2 KB 473 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 26(a)
Evidence Act 1950, s, 114(g)
National Land Code, s. 340(2), (3)

For the plaintiff - Anuar Ghani; M/s Anuar Datuk Ghani & Assocs
For the 2nd defendant - Maizatul Akmam Hj Alawi; M/s Tan Pang Tsen & Co
For the 3rd defendant - Yap Pak Vui; M/s Yap & Chin
For the 4th defendant - Halim Hanapiah, Jabatan Peguam Besar Negeri

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum J:

Introduction

This is an action commenced by the plaintiff as the administrator of the estate of his late father Ngui Tet Loi (the deceased) who passed away on 9 November 1986.

The subject matter of this action are four pieces of land, namely, CL115325721 measuring 15.08 acres; CL115325749 measuring 14.61 acres; PL116194140 measuring 11.25 acres and CL 115325758 measuring 14.91 acres. All these lands are situated at Lahad Datu (hereinafter collectively referred to as 'the said lands' where necessary). It is not in dispute that except for CL115325758 the rest of the said lands ('the acquired lands') are now registered in the name of the 3rd defendant since 17 October 1995 and the title deeds are in its possession as well.

The 1st defendant is dead and the estate for the purpose of this action is represented by Voo Yee Wei and Voo Min Wei, being the lawful sons of the 1st defendant. However nothing was done by the representatives to defend this action. And hence it was opened for the plaintiff to apply for a default judgment.

The Relief Sought By The Plaintiff:

The plaintiff prays for the following relief:

(a) A declaration that the transfer of the said Lands to the 1st Defendant and all subsequent dealings, transfers including registration to the 2nd and 3rd Defendants be declared null and void.

(b) That the issue document of title be delivered up to the 4th Defendant and that the registrar of title be rectified and that the name of the Plaintiff be endorsed on the Register Book and the Issue Document of Title.

(c) A declaration that the Plaintiff is entitled to the recovery of possession of the said Lands as against the 1st, 2nd and 3rd Defendants and all others deriving title from the 1st Defendant;

(d) Damages;

(e) Costs and any other relief as the Honourable Court deems fit and just.

The Defence

For the 2nd defendant basically her defence is that the 1st defendant owed her money in the total sum of RM160,000. Since the 1st defendant could not repay the loan the 2nd defendant was therefore given four title deeds with instruction to sell them and the proceeds to pay for the loan.

Whereas the 3rd defendant is resisting the claim by pleading *inter alia*, the defence of limitation and *bona fide* purchaser for value without notice.

Incidentally there was an earlier attempt to strike out the action on the ground of it being statute-barred. I heard the preliminary issue and ruled that in order to properly consider the issue, factual evidence should be adduced. Hence for the trial to proceed.

The Agreed Facts And Issues

At the commencement of the hearing the parties submitted a list of agreed facts inclusive of the emphasis thereto as reproduced herein:

1. The plaintiff is the son of Datuk Ngui Tet Loi (deceased) who died at the Queen Elizabeth Hospital Kota Kinabalu on 9th November 1986 and the Administrator of the deceased's estate by the Grant of Letters of Administration dated 13th July 1987 by the High Court of Borneo at Kota Kinabalu.

2. The Deceased was the registered owner of four (4) pieces of lands namely, CL115325721, CL115325758, CL115325749 and CL116194140 (hereinafter collectively referred to as "the said lands").

3. The said lands were transferred as follows:

   (a) CL11532578 was transferred from the deceased to the 1st Defendant on 15th July 1995 *vide* a Memorial No. 30248694 pursuant to a Memorandum of Transfer dated 9th October 1985 attested by Haji Karama Haji Omar Ali, Commissioner of Oaths. The consideration for the said transfer was for natural love and affection.

   The Plaintiff disputes the signatures of the deceased and the aforesaid Haji Karama Hj Omar Ali and alleges that both the signatures are forgeries.

   (b) CL115325749 was transferred from the deceased to the 1st Defendant on 15th July 1995 *vide* Memorial No. 30248694 pursuant to a Memorandum of Transfer dated 9 October 1985 attested by Haji Karama Haji Omar Ali, Commissioner of Oaths. The Plaintiff disputes that the signature is that of the deceased or of Haji Karama Hj Omar Ali and alleges that both the signatures are forgeries. The consideration of the said transfer was for natural love and affection. This land was subsequently transferred by the 1st Defendant to the 3rd Defendant on 5th March, 1995 *vide* Memorial No. 30253377. The issue document of title is in the possession of the 3rd Defendant.

   (c) CL116194140 was transferred from the deceased to the 1st Defendant on 15th July 1995 *vide* Memorial No. 30248693 pursuant to a Memorandum of Transfer dated 9th October 1985 attested by Haji Karama Haji Omar Ali, Commission of Oaths. The Plaintiff disputes

that the signature is that of the deceased or of Haji Karama Hj Omar Ali and alleges that both the signatures are forgeries. The consideration for the said transfer was for natural love and affection. This land was subsequently transferred by the 1st Defendant to the 3rd Defendant on 5th march 1996 *vide* Memorial No. 30253376. The issue document of title is in the possession of the 3rd Defendant.

(d) CL115325721 was transferred from the deceased to the 1st Defendant on 15th July 1995 *vide* Memorial No. 30248696 pursuant to a Memorandum of Transfer dated 9th October 1985 attested by Haji Karama Haji Omar Ali, Commission of Oaths. The Plaintiff disputes that the signature is that of the deceased or of Haji Karama Hj Omar Ali and alleges that both the signatures are forgeries. The consideration stated for the said transfer was for natural love and affection. This land was subsequently transferred by the 1st Defendant to the 3rd Defendant on 5th March, 1996 *vide* Memorial No. 30253378. The issue document of title is in the possession of the 3rd Defendant.

And the agreed issues to be tried are as follows:

1. Whether the Plaintiff's claim herein is statute barred under the Limitation Ordinance?

2. Whether forgery was involved in the signatures of the deceased transferor and the attestor in the 4 Memoranda of Transfer?

3. Whether the transfer of the 4 pieces of land to the 1st Defendant and all subsequent transfers are null and void?

4. Whether the execution of the Power of Attorney in favour of the 2nd Defendant by the 1st Defendant is valid, effective and enforceable?

5. Whether the Plaintiff is entitled under Section 114 of the Land Ordinance (Cap 48) to be registered in his capacity as the Administrator as the owner of lands left by the deceased.

6. Whether the Plaintiff is entitled to be restored as owner of the said lands or only damages in lieu thereof?

The Undisputed Facts

From the evidence adduced by the parties the following facts are not in dispute or that they have not been rebutted, namely:

(a) that it was the plaintiff who gave the title deeds of the said lands to the 1st defendant in or around January 1995 in order that she might be able

to use them to raise money for her medical expenses. This assertion of the plaintiff was not challenged by the defendants in particular by learned counsel for the 2nd defendant. It was the evidence of the plaintiff that he had earlier taken the title deeds from the legal office of Messrs Tan Pang Tsen. Surely attempt should have been made by the said legal firm as it is also representing the 2nd defendant to check its record to verify such an assertion. The failure to do so only enhanced the credibility of the testimony of the plaintiff on this issue although there is the evidence of DW2 Lam Yat Kheong stating that he first saw the 1st and 2nd defendants in Lahad Datu to see the said lands towards the end of 1994. But then again DW2 did say that he could not really remember the time. Thus I am inclined to accept that the assertion of the plaintiff that he gave the title deeds to the 1st defendant in or around January 1995 remains unchallenged or un-rebutted;

(b) that one title deed, namely, CL115325758 had been given to one of the sons of the 1st defendant at the behest of the 1st defendant;

(c) that the 1st defendant had borrowed money in the total sum of about RM160,000 from the 2nd defendant;

(d) that the 1st defendant could not pay back the loan and hence passed on the title deeds of the said lands to the 2nd defendant;

(e) that the estate of the deceased is yet to be wound up;

(f) that there is no conclusive evidence adduced as to when the 1st defendant passed away; and

(g) that two of the acquired lands have been planted by the 3rd defendant with oil palms and are now bearing fruits while the other piece had been leased to the Lahad Datu Golf and Country Club as part of the golf course.

The Limitation Issue

It was the thrust of the argument of the 2nd and 3rd defendants that the period of limitation should begin to run from the time the plaintiff was appointed as the administrator of the estate of the deceased, that is, on 7 September 1987.

Unfortunately no authority, statutes or case law, was submitted to substantiate such a contention.

For the plaintiff it was argued that the period should run from the time when he first came to know of the forgery of the transfer instruments in respect of the said lands. And in evidence the plaintiff said that he first came to know

of the position of the said lands in late 1995 when he was contacted by the son of the former owner informing him that someone was claiming to be the new owner of the said lands.

In view of the disclosure by the plaintiff as to how the title deeds of the said lands came into the possession of the 1st defendant the issue of limitation has become a non issue. There is no dispute that this action was commenced in 1997 and hence at most it would only be less than three years from the time the title deeds were first given away. That of course would be taking the time of parting with the title deeds as the starting point. However I am inclined to think that time should begin to run from the date when the alleged forgeries first became apparent to the plaintiff.

I am unable to accede to the contention of the 2nd and 3rd defendants since at that stage there was no question of the said lands being exposed to any risk of forgery. Indeed there was nothing to indicate that there was then any cause of action for the plaintiff to take in relation to the alleged forgeries.

Accordingly on the evidence as given I find this issue of limitation to be without any merit.

Forgery - The Evidence And Contentions

The foundation of the case of the plaintiff is that the alleged signatures of the deceased as the transferor on the memoranda of transfer purporting to transfer the said lands to the 1st defendant were forgeries. And the plaintiff further contends that the 1st defendant had no power to give any power of attorney to the 2nd defendant. Hence, according to the plaintiff all the transactions in respect of the said lands divesting the deceased of the ownership of the same were *void ab initio*. The principal question therefore is whether the purported signatures of the deceased were forgeries.

It is incumbent upon the plaintiff to prove on the balance of probabilities that indeed the signatures appearing on the impugned memoranda of transfer were forgeries. (See: *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 2 CLJ 133). Three main witnesses were therefore called to give their versions on the signatures.

The first witness PW1 – Siow Kwen Sia was called to testify as an expert. This witness began by giving his credential as a witness on handwriting. Thereafter he said that he was requested to examine the signatures ('the disputed signatures') appearing in four documents marked as Q1 to Q4 respectively and those signatures ('the specimen signatures') on documents marked as P3 (A to

O) which were given to him as specimen signatures of the deceased during the period from 1973 to 1986. It is to be noted that the common date appearing on those impugned memoranda of transfer to the 1st defendant is 9 October 1985. And as a result of his analysis of the disputed signatures he produced a Signature Verification Report admitted as exh. P2. Briefly it was the evidence of PW1 and he was 100% sure that the two sets of signatures came from different authors. From his analysis he found that while the basic features in both the sets were common, PW1 spotted the major differences one of which was the last loop. While it was consistent in the specimen signatures of the deceased that the last loop went to the left that was not the case for the disputed signatures which went to the right.

In answer to questions from learned counsel for the 3rd defendant, PW1 agreed that a person's signature could change as time passed and due to serious illness. PW1 further admitted that the wavering lines found in the disputed signatures were also appearing in the specimen signatures. But when he was shown the difference of two signatures of the deceased made ten years apart, PW1 admitted in not seeing the difference before it was pointed out to him during the cross-examination.

The next witness called was PW2 – Haji Karama Haji Omar Ali who was the alleged attestor to the disputed signatures. In his evidence PW2 said that based on the dates of the impugned documents he was then working with the Judicial Department Sandakan and was also then a Commissioner for Oaths. When shown of his purported signatures as the attesting person PW2 unequivocally denied that those were his signatures. He also denied ever meeting at his office the purported signatory of the disputed signatures who was known to him.

The plaintiff (PW5) also gave evidence pertaining to him being familiar with the signature of the deceased having worked under and with him for several years. It was the evidence of the plaintiff that the disputed signatures were not that of the deceased.

To corroborate the evidence of the witnesses called regarding the disputed signatures the Head of the Immigration Office Sandakan was called. PW4 – Musa bin Sulaiman was shown a passport that was issued to the deceased at the material time. This witness was particularly asked to identify the markings found in the passport which indicated departure of the holder from Malaysia. Upon examination of the markings PW4 said that from 4 October 1985 to 14 October 1985 the holder was out of the country. And this witness was adamant to say that although he was not the person who put down the markings from his experience he was sure that those markings were not forged.

In his final submission learned counsel for the plaintiff argued that the evidence adduced was overwhelming indicating that the disputed signatures were forgeries. Indeed it was also his contention that merely by visual examination one could see the differences between the disputed and specimen signatures.

Meanwhile learned counsel for 3rd defendant submitted that the evidence adduced was not conclusive in particular that of PW1 and that it would be unsafe to rely on them. He also reasoned that PW2 could not be expected to agree that the attesting signatures were his if indeed the signatory was not before him when he attested the disputed signatures. And learned counsel further said that it was quite a common practice for signatures being attested without the presence of the signatory. As regards the dates on the impugned documents it was the submission of learned counsel that the dates therein and those markings in the passport did not prove anything. He argued that in actual practice lapse of time between the signing of an instrument and the insertion of dates therein was not uncommon. As to the application of visual examination on the disputed signatures to determine their authenticity learned counsel submitted that such approach did not meet favourable response in previous cases. He cited the case of *Chu Choon Moi v. Ngan Siew Tin* [1986] 1 MLJ 34.

The reliability of the specimen signatures was also questioned. According to learned counsel they could not be safely relied upon as no one came to testify to say that indeed those were the signatures of the deceased. The evidence of the plaintiff on the specimen signatures was also disputed by learned counsel arguing that he never saw the deceased signing them.

Learned counsel for the 2nd defendant adopted the contention of learned counsel for the 3rd defendant on this issue.

Finding

Now, in so far as the evidence of PW1 is concerned it is an accepted principle of law that generally his evidence should be admitted without any requirement of corroboration. In *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153 his Lordship Anuar CJ (Malaya) said thus, *inter alia* at p. 186:

> (I)t is trite law that the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter, not the experts or eyewitness ... . The learned judge should have considered the reasoning given by the expert and with that assistance arrived at the conclusion. In failing to do so the learned judge had abdicated his function. The learned judge is entitled to reject the evidence but not before considering such evidence. The evidence of the expert is admissible and relevant to the fact in issue properly placed before the learned judge. The learned judge ought to consider all such evidence that is before him prior to

arriving at a finding on the issue. Only after such due consideration been given could he come to a finding. In the case before us, the learned judge did not consider the evidence of PW1 at all. The learned judge did not determine the issue of the forgery.

In the present case there was no serious challenge by the defendants either on the qualification of PW1 as an expert or on the method adopted in coming to his conclusion. The basic complaint in fact was that PW1 failed to see the difference in the signatures of the deceased that were signed ten years apart. It was also submitted that PW1 admitted that signatures of a person could change with the passing of times or affected by serious illness. Further it was contended by learned counsel for the defendants that the specimen signatures used by PW1 in verifying the disputed signatures were unreliable in that no one saw the deceased signing them. Apart from these the defendants made no attempt to challenge the qualification of PW1 and the fact that his testimonies as an expert had been accepted by the courts in previous cases.

Having considered the testimony of PW1 as a whole in the present case I have no doubt of his expertise in the field that he was called to give evidence. As such I have no reason not to accept his evidence pertaining to the authenticity of the disputed signatures. PW1 gave his reasons for coming to his conclusion and the final report that he prepared was duly admitted in evidence – Exh. P2. Meanwhile, the defendants failed to discredit those reasons or the method adopted in coming to his conclusion. It is also noted that the defendants deemed it unnecessary to call their own expert witness to counter the evidence of PW1.

In respect of the expression of doubt by learned counsel for the defendants on the specimen signatures, I do not think it is of any consequence. There was no complaint on the authenticity of the documents in which those specimen signatures were found. Indeed I do not think they could have at any rate since the documents included official and business transactions and their executions were contemporaneous.

The other key witness that was of assistance to the court in determining the status of the disputed signatures was PW2. In fact he was the only person alive to tell the tale. And he was not called as an expert but to identify the signatures that were alleged to be his signatures and found on the impugned documents. PW2 denied vehemently that those signatures attesting the disputed signatures were his. And from the dates on the impugned documents PW2 was supposed to have attested during that time, that is 1985 and when he was still working with the court. Meanwhile there was no challenge to the evidence of the plaintiff that it was him who gave the title deeds of the said lands to the 1st defendant in January 1995. In my view such a fact supports the denial of PW2 since by that time PW2 was no longer with the court. And although this witness said that after his retirement in 1986 he was appointed a Commissioner

for Oaths until 1990 and renewed until 1995 there was no suggestion that he attested those disputed signatures in 1995. He was asked under cross-examination of the possibility of him signing after he retired but he denied it. At any rate such a preposition would not be able to contradict the clear words of the stamp just below the purported signatures of PW2. Therein it is obviously stated that the attesting person was with the judicial department at the material time. And surely the defendants would not want to contradict themselves by suggesting that the impugned documents were only prepared and executed after 1986. Bearing in mind the date of demise of the deceased such a position to take would be a clear admission on the part of the defendants that the disputed signatures were forged. Furthermore there was no assertion from the defendants that when the title deeds were given by the plaintiff to the 1st defendant they were together with pre-signed memoranda of transfer.

Accordingly having considered the evidence as a whole pertaining to the disputed signatures I am inclined to accept and I am satisfied more than on the balance of probabilities that the plaintiff has proved the disputed signatures to be the product of forgery. In short they were forged. In fact I am satisfied as well on the balance of probabilities that the attesting signatures to the disputed signatures were also forged.

Effects of Forgery

This issue is a question of law, namely, whether a forged instrument of transfer conveys any title, interests or rights to subsequent purchaser upon registration. But firstly, it should be appreciated that under the Sabah Land Ordinance ('the Ordinance') there is no provision for indefeasibility of title on registration similar to that is found in the National Land Code ('the Code'). This has been affirmed in the case of *Borneo Housing Mortgage Finance Bhd v. Times Engineering Bhd* [1996] 2 CLJ 561. But the pertinent question to ask is whether the lacuna makes any difference when it comes to forged instrument. In my view it makes no difference and the Ordinance makes no exception for forgery or forged instrument. Hence the answer to the question of law has been initially provided for by the Court of Appeal in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd (supra)* where Gopal Sri Ram JCA said this at pp. 44-45:

> ... it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GMBH v. Schenkers Ltd* [1927] 1 KB 826 at p. 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. The extent to which statute has intervened in the case of a registration of title obtained by means of a forged instrument is a matter that we will deal with separately at a later stage.

However on appeal of that case the Federal Court did not answer the question in the fashion as the court below did. But I would think that indirectly the answer was the same. The Federal Court referred to s. 340 of the Code which reads:

> Registration to confer indefeasible title or interest, except in certain circumstances:
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

And this is what the Federal Court said at [2001] 1 CLJ 133 at pp. 138-139:

> Subsection (1) of s. 340 NLC is worded in plain language. It says that the 'title or interest of any person for the time being registered as proprietor of any land … shall be indefeasible' subject to the provisions contained in the section.
>
> We must bear in mind that a person may be registered as the sole proprietor or as a co-proprietor of a piece of land, but he is for the purpose of this section still a registered proprietor. He might have become a registered proprietor of the land because he had bought it, or he got it by way of a gift, or by way of transmission upon the death of his parent or spouse. Therefore, a piece of land may have one proprietor or many co-proprietors. Subsection (1) of s. 340 NLC deals with everyone of them as long as he is currently a registered proprietor of that piece of land. So long as his name is on the land register, his title or interest is indefeasible unless caught by sub-s (2) and (3).
>
> Subsection (2) of s. 340 NLC uses the word 'such'. When the word 'such' occurs in a section it must not be ignored, but must be read as referring back to the preceding provision – *Ellis v. Ellis* [1962] 1 WLR 227.
>
> Subsection (2) states that the title of any such person, ie any registered proprietor or co-proprietor for the time being, is defeasible if one of the three circumstances in sub-s. (2)(a), (b) or (c) occurs. We are concerned here with sub-s. (2)(b) where the registration had been obtained by forgery.
>
> Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s. (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s. 3(b) says any interest under any lease, charge or easement subsequently 'granted thereout', ie out of the forged document may be set aside.
>
> However, sub-s. (3) of s. 340 NLC does not stop there. It contains a proviso.
>
> It is a cardinal rule of interpretation that a proviso to a particular section or provision of a statute only embraces the field which is covered by the main provision. The object of a proviso is to qualify or limit something which has gone before it. Its proper function is to except and deal with a case which would otherwise fall within the general language of the main provision of the statute, and its effect is confined to that case. In other words, the object of a proviso is to carve out from the substantive section or clause of a statute, a class or category of persons or things to whom or to which the main section does not apply. The proviso cannot be divorced from the main clause to which it is attached. It must be considered together with the section or subsection of the statute to which it stands as a proviso.

> The proviso to sub-s. (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s. (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s. (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.
>
> We therefore, agree with the High Court Judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent *(sic)* nevertheless obtained an indefeasible title to the said lands.

In other words under the Code a forged instrument does not render a transaction void *ab initio* but only voidable and hence rights, interests and titles to land becomes indefeasible despite the forgery if the requirements of the proviso to sub-s. (3) of s. 340 are met. Incidentally the view of the Court of Appeal on this point is that the registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in sub-s. (2) of s. 340 of the Code is not within the category of the word 'any purchaser' in the proviso to sub-s. (3).

The next question is obvious. Should the same principle, in particular the doctrine of *bona fide* purchaser for value and without notice, apply despite the lacuna in the Ordinance?

In considering this question several facts have to be noted. Firstly, the courts in *Boonsom Boonyanit (supra)* was dealing with the provisions of the Code which is not applicable in Sabah. Secondly there is no provision in the Ordinance that is similar to s. 340 of the Code. However, that poser appears to have been answered, albeit indirectly, by the Federal Court in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561.

Speaking through Edgar Joseph Jr FCJ the Federal Court said this at p. 584:

> On a further ground also – not taken up before us – the appeal was bound to succeed. What was overlooked all round was that well before the judgment was pronounced on 25 April 1994, the interest of the purchaser at the judicial sale had intervened, there having been already issued the certificate of sale dated 26 February 1992 aforesaid in its favour and it being a purchaser in good faith for valuable consideration and without notice of the circumstances alleged to render the finance company chargee's title defeasible.

And the learned judge concluded at p. 585 by saying thus:

> In the result, we had no hesitation in unanimously allowing the appeal with costs here and below, setting aside the judgment of the court below and answering the question of priority which arose for decision in favour of the finance company chargee. The orders made by the Assistant Collector of Revenue, Kota Kinabalu were accordingly restored and the sale to the purchaser at the judicial sale affirmed.

Thus in Sabah with specific reference to land the principle as enunciated by the Federal Court in *Adorna Properties Sdn Bhd (supra)* applies notwithstanding the lacuna in the Ordinance. In other words no one derives good title, right or interest from or through a forged instrument unless he satisfies the doctrine of *bona fide* purchaser for value and without notice.

Was The 3rd Defendant A *Bona Fide* Purchaser For Value And Without Notice Of The Acquired Lands?

It is for the 3rd defendant to establish on the balance of probabilities, being a civil matter, that it has satisfied the requirements of the doctrine of *bona fide* purchaser for value and without notice. (See: *Pekan Nenas v Chang Chin Chuen* [1998] 1 CLJ 793; *Wilkes v. Spooner* [1911] 2 KB 473).

In the instant case it is to be noted that the 3rd defendant is a subsequent purchaser of the acquired lands after the 1st defendant who became the registered owner of the said lands *vide* the impugned memoranda of transfer wherein the disputed signatures were found. There was no issue as regards the signatures in the memoranda of transfer as between the 1st defendant and the 3rd defendant. The main issue that was raised as between the parties was on the validity of the power of attorney given by the 1st defendant to the 2nd defendant. I will deal with that issue later on in this judgment. The other issue in so far as it concerned the 1st defendant was whether she had acquired good titles to the said lands since the purported consideration for the transfer from the deceased to her was on the basis of 'love and affection'. And it was contended that as between them there was no form of relationship recognised in law as to justify the consideration as stated in the memoranda of transfer. I will address this issue after determining the status of the 3rd defendant as the purchaser of the acquired lands.

For the 3rd defendant the evidence of DW2, Mr Lam Yat Kheong was crucial on this pertinent issue. It is not in dispute that DW2 is a director of the 3rd defendant and that he was responsible for the purchase of the acquired lands from the 1st defendant through the 2nd defendant.

It was the evidence of DW2 that he first met the 1st and 2nd defendants in or around the end of 1994 when they came to inspect the said lands. At that time there was no talk of sale. It was only later on that the 2nd defendant who held a power of attorney from the 1st defendant approached him with the proposal to sell three pieces of the said lands. And even at that time he did not immediately seize the opportunity. He requested the 2nd defendant to deposit the title deeds and the power of attorney with his solicitors, Messrs Chin Lau Wong and Foo so that verification and checks could be made. It was only after he was told that the title deeds were clean that he negotiated on the purchase price which was finally agreed at RM120,000.

Under cross-examination DW2 agreed that at the material time he was developing the Lahad Datu Golf and Country Club. And he also acknowledged that there was an expansion move by the Club in order to make it an 18 holes golf course. Initially the Club had only 94 acres of land. With subsequent acquisition the total area presently stands at 300 acres.

The 2nd defendant in her evidence said that the 1st defendant was her neighbour and knew her for over ten years. Between 1990 and 1995 the 1st defendant had already borrowed money from her in the total sum of RM160,000. As the 1st defendant could not repay the loan she was then given four title deeds and a power of attorney in August 1995. It is to be noted that the transfers of the said lands to the 1st defendant were all dated 15 July 1995. The 2nd defendant went on to state that subsequently the 1st defendant asked her to sell three pieces of the said lands and one piece to be retained for the son of the 1st defendant as a remembrance. According to the 2nd defendant it was the 1st defendant who found the 3rd defendant as the buyer for the acquired lands. By 17 October 1995 the transaction was completed with the 2nd defendant receiving the full purchase price which according to her was not sufficient to cover the total loan of the 1st defendant with her.

In his submission learned counsel for the 3rd defendant argued that in the statement of claim of the plaintiff there was in fact no blame laid upon his client. And according to learned counsel the defence of *bona fide* purchaser for value and without notice was not challenged or disputed by the plaintiff. It was further contended that the steps taken by DW2 before concluding the deal with the 2nd defendant showed lack of knowledge of any adverse claim on the said lands or of defects in the ownership. It was also the contention of learned counsel that in purchasing the acquired lands the 3rd defendant was a 'purchaser behaving honestly'. (See: *Pekan Nenas Industries Sdn Bhd (supra)*; *Pilcher v. Rawlins* [1871-72] 7 LR Ch Appellant 259).

In reply learned counsel for the plaintiff highlighted the fact that DW2 was at the material time developing the golf course in which land area was important to attract membership. In other words learned counsel hinted motive on the part of DW2. It was further submitted that the evidence of DW2 in respect of his meetings with the 1st and 2nd defendants should call for scrutiny. According to learned counsel it would be an unusual sight of two ladies coming to see 'their' lands and such event should have made any reasonable man circumspect and suspicious in particular when the 2nd defendant offered to sell the said lands to the 3rd defendant.

Further points raised by learned counsel for the plaintiff were on the purchase price, the failure to call the lawyer responsible for the transaction, the inherent invalidity of the power of attorney of the 2nd defendant, that knowledge of the 3rd defendant on the claims of others such as the 1st defendant and the Soong family.

Now, in his attempt to show that the 3rd defendant was not a *bona fide* purchaser the plaintiff highlighted the fact that DW2 was one of the directors of the 3rd defendant. And at the material time DW2 was developing and expanding the Lahad Datu Golf and Country Club to 18 holes golf course. In other words the plaintiff was implying that because of DW2 and of his plan to expand the golf course the 3rd defendant would be bound by his knowledge and motive in respect of the purchase of the acquired lands.

With respect I think such an assumption is quite far-fetched based on the facts and the circumstances of the present case. There was no evidence to indicate that DW2 was instrumental in getting the agreement of the 1st or 2nd defendant to sell the acquired lands. In fact it was in evidence that DW2 used the services of a legal firm to handle the transaction. And although it was not in dispute that DW2 was then actively developing the golf course, in my view that would not be sufficient to show that he behaved dishonestly which would lead to a conclusion that he must have played an important role in enabling the 1st and 2nd Defendants to sell the acquired lands.

Learned counsel for the plaintiff also made a feeble attempt in his submission that the purchase price for the acquired lands was below the ongoing market price at that time. But there were no figures submitted for comparison purpose. No adverse conclusion should therefore be made based on the purchase price for the acquired lands.

Accordingly it is my finding that the 3rd defendant has proved and satisfied the court on the balance of probabilities that in purchasing the acquired lands, it was a *bona fide* purchaser for value without notice.

Other issues

One side issue that seemed to be quite of an interest raised by learned counsel for the plaintiff was on the point of consideration given in the transfer of the said lands from the deceased to the 1st defendant.

Briefly it was the contention of learned counsel for the plaintiff that since the deceased and the 1st defendant were not 'in a near relation' there could not be any consideration on the basis of 'love and affection' and hence the transfer was void for want of consideration as provided under s. 26(a) of the Contracts Act 1950.

The response by the respective learned counsel for the 2nd and 3rd defendants on this point was simply that there was a pure gift and hence the transfer was valid.

Now, I do not think s. 26(a) of the Contracts Act 1950 is of any relevance in this case. That section speaks of an agreement. In the present case there is no question of any agreement entered between the deceased or the plaintiff and the 1st defendant. The fact is that the plaintiff gave the title deeds to the 1st defendant. Thus I agree with the stand taken by the respective learned counsel for the 2nd and 3rd defendants that it was a gift, pure and simple. Accordingly this side issue as raised has no merit.

Learned counsel for the plaintiff also submitted that the power of attorney given to the 2nd defendant was invalid as it was made even before the 1st defendant was registered as the owner of the said lands. Such argument was based on the fact that the power of attorney was dated 5 May 1995 while the 1st defendant only became the registered owner of the said lands on 15 July 1995.

I think this issue should be considered in two parts. First part as between the plaintiff and the 1st defendant and the second part as between the 1st defendant and the 3rd defendant. In respect of the first part I am of the view that the validity of the power of attorney is a non-issue. The transfer to the 1st defendant was on the basis of the memoranda of transfer (discounting their status) and not the power of attorney.

As for the second part there should be no question asked pertaining to the power of attorney since the transaction between the 1st defendant and the 3rd defendant only took place on 17 October 1995 which was well after the registration of the 1st defendant as the registered owner of the said lands.

As for the time in the creation of the Power of Attorney I do not think there is much to be said as it is not in dispute that in January 1995 the title deeds were given to the 1st defendant by the plaintiff who knew that they could be used as security for loan that might be taken by the 1st defendant to pay for her medical expenses. In other words the gift was made in January 1995 and as the beneficial owner that in my view should entitle the 1st defendant to act on the title deeds including the creation of the Power of Attorney. In any event, in view of my finding on the status of the 3rd defendant as a *bona fide* purchase for value and without notice, this issue on the Power of Attorney is of no legal significance.

As to the contention of learned counsel for the plaintiff that the attestor to the signature in the Power of Attorney should have been called by the defendants and that such failure had triggered the application of s. 114(g) of the Evidence Act 1950 in relation to the execution of the said document, with respect I find no merit in it. In the first place there is no dispute on the authenticity of the signature therein. Secondly since it was the plaintiff who was asserting that there was no proper execution of the said document the onus was therefore upon him to prove such an assertion – (see: s. 103 of the Evidence Act 1950). And for that purpose there was nothing to prevent the plaintiff from calling the attesting witness.

In respect of the other issues raised by the parties hereto I have considered them. However I do not think it is necessary for me to deal with each one of them in any detail since my finding on any of them would not in any way alter my conclusion that I have arrived at in this case.

Orders Of The Court

The averment of the 2nd defendant that she gave one title deed CL115325758 to one of the sons of the 1st defendant was not disputed. And in view of my finding in respect of the signatures on those Memoranda of Transfer added by the fact that the representatives of the 1st defendant did not appear to defend the claim in this trial the inevitable result is that I should order the reversion of the ownership of CL115325758 to the estate of the deceased. Accordingly I hereby order that CL115325758 be retransferred to the estate of the deceased with the plaintiff as the administrator. And as the 4th defendant had taken the stand at the outset of the trial that it would be bound by any decision of this court I therefore make an order that there should be rectification of the Title Registry within 30 days from the date hereof (unless there is an appeal lodged) so as to reflect the retransfer. I am making this order on the basis that this particular piece is still in the name of the 1st defendant. Otherwise I order

that damages be assessed before the Deputy Registrar for the loss of the particular piece of land. Thus the claim of the plaintiff against the 1st defendant is allowed to the extent of the order that I have made hereinabove.

In respect of the claim of the plaintiff against the other defendants for the acquired lands I hereby dismiss it for the reasons given above. In particular I noted that in so far as the 2nd defendant was concerned there was no transfer of ownership of any of the said lands to her. She was only the donee under the Power of Attorney granted by the 1st defendant.

Costs to the plaintiff to be paid by the 1st defendant while the plaintiff is to pay costs to the 2nd and 3rd defendants and to be taxed unless agreed.